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No. 06-5306

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IN THE

Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

PAUL MANCINO, JR. *
PAUL MANCINO, III
BRETT MANCINO
75 Public Square, Suite 1016
Cleveland, Ohio 44113-2098
(216) 621-1742

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an appellate court may *sua sponte* dismiss an appeal which has been filed withing the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit (Sixth Circuit) issued a published opinion which is reported at 432 F 3d 668 (6th Cir 2005). The Sixth Circuit also issued a series of unpublished orders which are reproduced in the Joint Appendix.

The United States District Court for the Northern District of Ohio (District Court) did not issue a published opinion. The relevant District Court judgments and orders are reproduced in the Joint Appendix.

JURISDICTION

The Sixth Circuit filed its opinion and a concurrent judgment dismissing the appeal for lack of jurisdiction on

December 28, 2005. Petitioner timely filed a petition for a rehearing and a suggestion for a rehearing en banc. On April 21, 2006, the Sixth Circuit denied the petition for a rehearing and rehearing en banc. Petitioner filed his petition for writ of certiorari July 14, 2006. The statutory provision conferring jurisdiction is 28 U.S.C § 1257.

The United States Supreme Court, on December, 7, 2006, granted petitioner's writ of certiorari to review the judgment of the Sixth Circuit.

RULES OF APPELLATE AND CIVIL PROCEDURE INVOLVED

RULE 1(a)(2) of the Federal Rules of Appellate Procedure

(a) Scope of Rules.

* * *

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

RULE 4(a)(6) of the Federal Rules of Appellate Procedure

(a) Appeal in a Civil Case

* * *

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the

moving party received notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Rule 26(b)(1) of the Federal Rules of Appellate Procedure

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires But the court may not extend the time to file:

(1) a notice of appeal (except as authorized In Rule 4) or a petition for permission to appeal;

RULE 6(b) of the Federal Rules of Civil Procedure

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(B), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

STATEMENT OF THE CASE

Petitioner Keith Bowles, instituted this action seeking a writ of habeas corpus with respect to the judgment and sentence entered by the Court of Common Pleas of Lake County, Ohio. Petitioner was convicted of murder and sentenced to a term of imprisonment of fifteen (15) years to

life. His petition was filed on August 5, 2002 Respondent filed a return of writ on October 24, 2002 (Jt. App. 14-58).

Petitioner thereafter filed his traverse to the return of writ and his brief on December 2, 2002 (Jt. App. 59-88).

The Magistrate Judge, on May 23, 2003, issued a report and recommendation recommending that the petition be denied. Petitioner filed his objections and exceptions to the report and recommendation of the Magistrate Judge on June 27, 2003 Respondent filed a response in opposition to petitioner's objections on July 10, 2003. (Jt. App. 89-137).

On the same day, July 10, 2003, the District Court filed its memorandum and opinion adopting the Magistrate Judge's report and recommendation together with a concurrent judgment entry dismissing the petition for writ of habeas corpus (Jt. App. 140-42).

On August 6, 2003, Petitioner filed a motion for a new trial, or in the alternative, to alter and amend judgment. The District Court denied the motion on September 9, 2003. Significantly, however, neither the District Court nor the clerk served the order on either petitioner or his attorney. After learning of the District Court's ruling, Petitioner, on December 12, 2003, filed a motion to vacate and to reopen the time for an appeal. The District Court, on February 10, 2004, granted Petitioner's motion to reopen the appeal time by February 27, 2004. Petitioner, on February 26, 2004, filed his notice of appeal (Jt. App. 145-53).

On March 10, 2004, the Sixth Circuit filed an order ordering Petitioner to show cause in writing, not later than twenty (20) days from the date of the order, why his appeal should not be dismissed for lack of jurisdiction. Petitioner timely responded to this order (Jt. App. 154-58).

On April 26, 2004, a panel of the Sixth Circuit reviewed Petitioner's response to the order to show cause why the case

should not be dismissed for lack of jurisdiction because of a claimed late notice of appeal. A panel of the Sixth Circuit ruled that the appeal should be dismissed for lack of jurisdiction only as it applied to the July 28, 2003 judgment and the September 9, 2003 order of the District Court denying Petitioner's motion for a new trial or alter and amend judgment. The Sixth Circuit further ruled that Petitioner's notice of appeal was timely as to the February 10, 2004 order of the District Court. (Jt. App. 159-61).

On September 8, 2004, another Sixth Circuit panel filed an order denying Petitioner a certificate of appealability. Petitioner thereafter filed a motion for reconsideration setting forth his constitutional claims he wished to present in his appeal (Jt. App. 162-73).

On December 28, 2004, a different Sixth Circuit panel granted a certificate of appealability for the following issues:

> [W]hether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police. . . . (Jt. App.174).

Another Sixth Circuit panel, on December 28, 2005, dismissed the appeal ruling that Petitioner did not file a timely notice of appeal within the fourteen (14) day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure even though Petitioner's notice of appeal was filed timely in accordance with the extension of time granted by the District Court. Petitioner sought a rehearing en banc or a rehearing from the original Sixth Circuit panel. The motion was denied on April 21, 2006 (Jt. App. 175-193a).

Petitioner filed his petition for writ of certiorari on July 14, 2006. The petition for writ of certiorari was allowed by this Court on December 7, 2006.

SUMMARY OF ARGUMENT

The issue in this case is whether Petitioner, reasonably relying upon the District Court's reopening the appeal time to February 27, 2004, three days beyond the 14-day period prescribed by Rule 4(a)(6), deprived the Sixth Circuit of Appeals of Jurisdiction. Petitioner, in accordance with the District Court's grant of additional time, filed his notice of appeal on February 26, 2004.

After the case had been briefed on the merits, the Sixth Circuit ruled that it was without jurisdiction because the District Court did not have authority to grant more than fourteen (14) days to file a notice of appeal after granting a Rule 4(a)(6) motion to reopen the appeal.

This issue should have been resolved as a "claim-processing" issue rather than a jurisdictional issue. As noted, Respondent filed no objection to Petitioner's motion to reopen the appeal. Respondent did not even reference any jurisdictional Issue until he inserted two sentences in his merit brief filed in the Sixth Circuit.

This case presents one of those unique circumstances where a party has relied on an order of the court and performed the requested act within the time limitations set by the court. No timely objection was registered by Respondent to the District Court's rulings until some thirteen (13) months later. Any claimed jurisdictional objection thus would be deemed forfeited or waived at that point.

Whether Respondent's silence is deemed a "waiver" or "forfeiture," Petitioner's appeal should not have been dismissed in summary fashion. Although this precise issue may not have been decided by this Court, this Court in similar cases has ruled that even arguably untimely filings did not deprive the appellate court of jurisdiction. Completely overlooked in the analysis by the Sixth Circuit, in dismissing Petitioner's appeal, was that Respondent did not timely object

to the action or order of the District Court. In the words of Chief Justice Roberts:

> Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike. . . . *Martin v. Franklin Capital Corp.*, 126 S Ct 704, 710 (2005).

Petitioner has presented four (4) reasons why the ruling by the Sixth Circuit was in error. First, if properly viewed, Rule 4(a)(6) of the Federal Rules of Appellate Procedure is a "claim-processing" rule. So viewed, the party adversely affected, in this case Respondent, would be required to timely object to any order of the court Because there was no objection by Respondent until Respondent filed his brief in the Sixth Circuit some thirteen (13) months later, any objection would be forfeited by that time. This is in accordance with pronouncements by this Court in *Eberhart v. United States*, 126 S Ct 403 (2005) and *Kontrick v. Ryan*, 540 U S 443 (2004), where the litigants' untimely filed motions or pleadings with the court. In both of those cases, the opposing party failed to timely object. Because of this, this Court ruled that this delinquency constituted a waiver of forfeiture.

A second reason is that this case presents a set of "unique circumstances." Petitioner reasonably relied upon a court order which seta specific date by which Petitioner was to file his appeal. Petitioner complied with the court order. Thus, this presented circumstances similar to those in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U S 215 (1962) and *Thompson v. INS*, 375 U S 384 (1964).

In each of those cases litigants relied upon a directive from the court and complied with the directive from the court. Even though it was later determined that the court was in error in granting the requested authorization, reasonable reliance on those court orders allowed the case to proceed. This

was because the affected party had received a specific assurance by a judicial officer that the act had been properly done.

Petitioner, in a similar predicament, applied to the District Court to reopen his appeal time. The District Court ruled that Petitioner's motion to reopen his appeal was well-taken and granted Petitioner 17 days in which to file his notice of appeal. Petitioner complied with the District Court order. He filed his notice of appeal by the deadline set by the District Court. Based on these unique circumstances, the rules should not have been so inflexibly applied without regard to the underlying circumstances. *Fallen v. United States*, 378 U S 139, 142 (1964). Instead, Petitioner's time to appeal should have been tolled based upon basic principles of fairness and equity.

A third reason was that any perceived defect was 'curable." Notwithstanding the Sixth Circuit's ruling that it had no jurisdiction over the order of the District Court reopening the appeal, the Sixth Circuit did have jurisdiction to cure any defect

Since it is the usual practice of courts to decide appeals on their merits, the Sixth Circuit could have vacated the February 10, 2004 order of the District Court reopening the appeal and remanded the case to the District Court with instructions to grant time to reopen the appeal for the fourteen (14) day period specified by the rule. Thus, any deficiency would have been cured at that juncture.

Lastly, the District Court did have authority to extend the fourteen (14) period. The only jurisdictional barrier, if there were one, was that Petitioner's motion to reopen the appeal had to be filed within 180-days of the entry of the order of the District Court. Petitioner complied with that deadline. There was no restriction against granting more than fourteen (14) days to Petitioner to file his notice of appeal.

Indeed, basic concepts of equity and fairness certainly should favor Petitioner, Petitioner, understandably, did all he

could do in the circumstances and should not have been summarily deprived of his appellate rights.

ARGUMENT

A DISTRICT COURT MAY PROPERLY GRANT AN EXTENSION OF TIME BEYOND THE FOURTEEN (14) DAYS AUTHORIZED BY RULE 4(a)(6) OF THE FEDERAL RULES OF APPELLATE PROCEDURE WHEN GRANTING A TIMELY FILED MOTION TO REOPEN THE APPEAL TIME.

The Sixth Circuit, in its opinion, framed the issue as follows:

> [T]he fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not susceptible to extension through mistake, courtesy or grace. 432 F.3d 668, 669 (6th Cir. 2005) (Jt. App. 177).

The District Court granted Petitioner's motion to reopen his appeal in a marginal entry. While a court should make findings stating that all of the requirements of Rule 4(a)(6) have been satisfied, it must be assumed that the District Court so found. In any event, there was no objection by Respondent.

As noted by Chief Judge Posner of the Seventh Circuit Court of Appeals:

> The new rule does not grant a district judge carte blanche to allow untimely appeals to be filed. He must make findings that the conditions prescribed by the rule have been satisfied. This requirement is important to prevent the rule from being treated by judges and litigants as purely discretionary, transforming the 30-day period for taking an appeal into a 180-day period. *Matter of Marchiando*, 13 F.3d 1111, 1114 (7th Cir. 1994).

In this case, the District Court did not act in an arbitrary manner in granting Petitioner's motion to reopen his appeal.

As more fully set forth below, Petitioner complied with Rule 4(a)(6)'s "jurisdictional" requirements. As a result, the District Court acted properly in allowing him to reopen his appeal.

A. Rule 4(a)(6) Is A "Claim-Processing" Rule Requiring A Timely Objection By Respondent.

The Sixth Circuit, in its opinion, went to great lengths in distinguishing the most recent pronouncements on appellate jurisdiction and "inflexible claim-processing" rules which were considered by this Court in *Eberhart v. United States*, 126 S.Ct. 403 (2005) and *Kontrick v. Ryan*, 540 U.S. 443 (2004).

The Sixth Circuit distinguished *Kontrick* ruling that, because no statute specified a time limit for filing a complaint objecting to a debtor's discharge, the controlling time limitations were those set forth in the Federal Rules of Bankruptcy Procedure. Thus, because the petitioner in *Kontrick*, in answering an untimely complaint, did not address the issue of untimeliness, he forfeited any right to rely on the time limits of the Federal Rules of Bankruptcy Procedure.

Further, the Sixth Circuit ruled that Petitioner's case was different from *Eberhart* because the government had opposed defendant's motion for a new trial which, in part, was untimely, on the merits. The government thus had not ignored any timeliness issue:

> In both these ways, the case at bar is distinguishable. The government, did not, nor did it need to, oppose Bowles's Rule 4(a)(6) motion in the district court. Instead, it objected to the timeliness of the appeal in its brief. (See Br. Of Resp't. at 1) ("This Court lacks jurisdiction to hear this appeal"). And, in contrast to the situation in Kontrick, Congress has limited our jurisdiction in the Act of December 9, 1991, Pub.L. 102-198, § 12, 105 Stat. 1623, 1627 (codified at 28 U.S.C.

> § 2107) ("the district court may . . . reopen the time for appeal for a period of 14 days. . . ."). For these reasons, we think that Rule 4(a)(6) is, in fact, "a prescription [ ] delineating the classes of cases" that we may hear. 540 U.S. at 455. In addition, the respondent, by objecting in his brief to this court, never forfeited his right to strict adherence to Rule 4. 432 F.3d at 672 n.1 (emphasis added) (internal citations omitted) (Jt. App. 181-82).

The Sixth Circuit presumptively attributed Petitioner's or his counsel's lack of notice as "fault for failing to comply with the requirements imposed by electronic filing" 432 F.3d at 670 (emphasis added) (Jt. App. 179).

Respondent filed no written opposition to Petitioner's Appellate Rule 4(a)(6) motion to reopen the appeal time, which was filed on December 12, 2003. Respondent's first written allusions to any jurisdictional issue were oblique references in two sentences in Respondent's appellate brief which was filed March 14, 2005, some thirteen (13) months after the February 10, 2004 order.

The facts in this case are even more compelling because, in past cases, the lack of filing an objection did not preclude even untimely submissions which did not have the imprimatur of a court order. In this case, by contrast, Petitioner's notice of appeal was expressly authorized by the District Court. ("Appeal to be filed by 2/27/04"). In other cases where there has been no prior court authorization, the failure of the opposing party to timely object has been deemed fatal to any opposition.

Analyzing this issue properly as a "claim-processing" one, the burden of due diligence to timely object would rightly be placed on the party who would be adversely affected by an untimely filing. As noted in *Eberhart v. United States, supra*, "These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." 126 S Ct at 407 (emphasis added)

Likewise, in *Kontrick v. Ryan, supra*, this court framed the issue as "whether Kontrick forfeited his right to assert the untimeliness of Ryan's amended complaint by failing to raise the issue until after that complaint was adjudicated on the merits. . . ." 540 U.S. at 458 (emphasis added).

In the present case, Respondent's delinquency of thirteen (13) months should have yielded the same result. Respondent did not object until he filed his brief in the Sixth Circuit on March 14, 2005.

The 'jurisdictional" analysis by the Sixth Circuit in this case was incorrect. In *Eberhart*, this Court rejected the court of appeals' reliance on *United States v. Robinson*, 361 U.S. 220 (1960), concluding that *Robinson* did not address the issue of subject matter jurisdiction of a district court. It was on that basis that *Robinson* was "narrow and unremarkable" as "district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." 126 S Ct at 406 (emphasis added). The unanimous decision in *Eberhart* observed that prior cases, including *Robinson*, which held that the timely filing of a notice of appeal was mandatory and jurisdictional, created some confusion. Thus, the essence of *Eberhart* was that the rules were not jurisdictional, only merely "claim-processing rules, [which] assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." 126 S.Ct. at 407 (emphasis added).

Petitioner, in this case, did not forfeit his right to appeal. He relied reasonably on a ruling by the District Court to file his appeal by February 27, 2004.

While petitioner was not proceeding *pro se*, he was in a similar situation to that faced by a *pro se* litigant in *Houston v. Lack*, 487 U.S. 266 (1988). In *Houston*, petitioner, a *pro se* litigant, timely drafted a notice of appeal and deposited the notice with the prison authorities for mailing to the district

court. However the notice of appeal did not arrive at the district court until thirty-one (31) days after the judgment. This was one (1) day after the expiration of the thirty (30) day filing period for filing a notice of appeal mandated by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. Consequently, the appeal was dismissed as being out of time. The appellate court ruled that it was without jurisdiction

This Court reversed, ruling that delivery to prison authorities for mailing sufficed. The failure of prison authorities to forward the notice of appeal to the clerk of courts before the appeal time expired did not deprive the appellate court of jurisdiction

While the petitioner in *Houston* had proceeded *pro se*, Petitioner in this case is in a similar predicament. Petitioner relied on the District Court's order. There was no objection to Petitioner's request. As noted above, Respondent's objection appeared in a second cryptic statement. In his appellate brief: "This Court lacks jurisdiction to hear an appeal from any judgment denying Bowles' claims on the merits." (Respondent-Appellee's Final Brief at p. 4). (emphasis added). Up to that point, there was no objection nor was there any appeal filed by Respondent from the District Court's order of February 10, 2004. The Sixth Circuit had even issued a series of orders addressing the jurisdictional issue before it. The Sixth Circuit, on one occasion, had even denied Petitioner a certificate of appealability. A certificate of appealability was later granted after the court granted Petitioner's motion for reconsideration and ordered briefing on merit issues in Petitioner's habeas appeal. (Jt. App. 174).

Given the District Court's extension of time to February 27, 2004, "petitioner did all he could under the circumstances." *Fallen v. United States*, 378 U.S. 139, 144 (1964), and his appeal should not have been dismissed.

B. "Unique Circumstances" And Reasonable Reliance On A Court Order Equitably Tolled Petitioner's Time To Appeal.

A conundrum in this case was the Sixth Circuits's recognition of but distinguishing the "unique circumstances" where courts have allowed an appeal even if filed outside any statutory or rule-mandated time limitation. The Sixth Circuit cited *Osteneck v. Ernst & Whinney*, 489 U.S. 169 (1989), which held that a post-judgement motion for prejudgment interest was a motion under Rule 59 of the Federal Rules of Civil Procedure which extended the time for filing a notice of appeal while that motion pended. The Sixth Circuit, in declining to follow the reasoning of *Thompson*, noted that *Thompson* required a "specific assurance" 489 U.S. at 177. Significantly, the Sixth Circuit ruled that *Osteneck* limited *Thompson* because it

> "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal *and has received specific assurance by a judicial officer that this act has been properly done.*" 432 F.3d at 675. (Jt. App. 187).

It is difficult to conceive a situation where an act could not receive any more judicial approbation than the present case. The District Court specifically granted Petitioner's application to reopen his appeal by setting a specific date. How much more assurance from a judicial officer can one receive? The District Court did not grant an open-ended period to reopen the appeal but set a specific date by which an appeal had to be filed. This is especially important because Respondent, at no time, until his brief filed in the Sixth Circuit some thirteen (13) months later, alluded to the fact that the court was without jurisdiction to consider Petitioner's appeal. If litigants cannot rely on a statement by a court then there would be no basis to rely on anything even a written statute or rule.

The inflexible application of Rule 4(a)(6) of the Federal Rules of Appellate Procedure ignored this Court's caveat that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v. United States*, 378 U.S. 139, 142 (1964) (emphasis added).

Unlike *Kontrick*, this case can be resolved based on "equitable tolling or any other equity-based exception. . . ." 540 U.S. at 457. One may not in good faith argue that a litigant does not have a right to rely upon an unequivocal order made by a court especially when that court has the authority to issue the order. The District Court in this case had the authority to allow Petitioner a period of time to reopen his appeal. Petitioner reasonably relied on the court's express authorization which set a specific date to file his notice of appeal, *i.e.*, February 27, 2004.

This case differs from *Browder v. Director, Dept. of Corrections of Illinois*, 434 U S 257 (1978), where petitioner, who had been granted a writ of habeas corpus, timely objected to respondent's untimely motion which requested a further stay of execution and an evidentiary hearing by contending that the district court had no jurisdiction to alter and amend its final judgment and order.

The district court in *Browder* nevertheless conducted an evidentiary hearing. It again adhered to its prior ruling and denied respondent's motion to reconsider. A notice of appeal was filed by respondent. Petitioner again asserted that the court of appeals lacked jurisdiction to review the original order granting relief because the notice of appeal was not filed within thirty (30) days of the date of that order and that the time for appealing had not been timely tolled by a proper post judgment motion.

In any event, the Seventh Circuit in *Browder* reversed the District Court's grant of a writ of habeas corpus. Upon further

review by this Court, the Court considered what order or judgment provided the commencement of the time for appealing and what proper available tolling mechanisms were available to toll the time for appealing. The Court ruled that respondent's untimely filing of motions for a stay and for an evidentiary hearing, filed some sixty-eight (68) days after the judgment, deprived the court of jurisdiction Consequently, the judgment of the Court of Appeals was reversed.

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd Partnership*, 507 U.S. 380 (1993), the Court considered whether a creditor's failure to timely file proof of claim, which was the result of excusable neglect, precluded the consideration and allowance of a late claim. In that case, a creditor had relied on an assurance from counsel. Counsel had inadvertently failed to file a proof of claim within a deadline set by the court. This was held to be excusable neglect. The Court ruled that the late filing would be allowed. Here, Petitioner relied on an assurance from the District Court which makes his case even more compelling than *Pioneer, supra* where mere reliance on counsel's representations, not the court, was enough.

In these circumstances, *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964), should have been applied by the Sixth Circuit to the unique circumstances of this case.

In *Harris Truck Lines, supra*, the judgment of the trial court become final while a lead member of the litigation team was on vacation in Mexico. Thus, another counsel, not knowing whether an appeal should be filed, moved for an extension of the regular thirty (30) day limit for filing a notice of appeal. The district court granted the motion and extended the appeal time for an additional two (2) weeks. Within that two (2) week period the notice of appeal was timely filed. On appeal, the Sixth Circuit ruled that appellant had not met the statutory standard of "excusable neglect based on a failure of

a party to learn of the entry of the judgment" 371 U.S. at 216 (quoting then Fed. R. Civ. P. 73(a) (emphasis added). It therefore dismissed the appeal.

On further review this Court noted that there was an "obvious great hardship to a party who relies upon the trial judge's finding" which finding should be given "great deference." 371 U.S. at 217. (emphasis added). Referencing the existence of the "unique circumstances" which precluded the Court of Appeals from disturbing the trial court judge's ruling as the case presented "unique circumstances" the Court reasoned that substantial justice would be denied to one who, in good faith, relied on the trial judge's ruling.

In *Thompson v, INS, supra*, the trial court accepted an untimely motion for a new trial to which the government did not object. The motion for a new trial was denied. A notice of appeal was filed that was timely with respect to the denial of the motion for a new trial. The court of appeals dismissed the appeal. That dismissal was reversed by the Supreme Court because "petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. . . ." 375 U.S. at 387. (emphasis added).

Petitioner, In this case, filed his motion to reopen the appeal within the prescribed 180 day limit. The District Court granted the unopposed motion, presumably finding that all requirements necessary to reopen the appeal time had been satisfied by petitioner. Thus, if Respondent felt the court had erroneously granted the motion to reopen the appeal, a timely objection would have been appropriate. It would be at that point that the Respondent could have asked the court to reconsider and brought to the District Court's attention that it did not have the authority to grant seventeen (17) days but was limited to fourteen (14) days. Thus, this problem could have been obviated with due diligence by Respondent. If

nothing else this is a case &unique circumstances" of a litigant relying on a "trial judge's finding."

The Sixth Circuit considered a situation in which the Ohio Supreme Court had granted defendant in a death penalty case an extension of time to file a petition for post-conviction relief which would toll the time for filing a habeas corpus petition beyond the one-year period specified by 28 U.S.C. §2241(d)(1). In *Keenan v. Bagley*, 400 F.3d 417 (6th Cir. 2005), petitioner Thomas M. Keenan's habeas corpus petition was dismissed by the district court because it was not filed within Title 28 U.S.C. § 2241(d)(1)'s statute of limitations. However, Keenan had been granted a six (6) month extension of time by the Ohio Supreme Court in which to file his petition for post-conviction relief. Keenan timely filed his petition for post-conviction relief within the time period specified by the Ohio Supreme Court. However, in the meantime, the Ohio Legislature had amended the Ohio post-conviction statute requiring a post-conviction petition to be filed within 180 days after the trial transcript from the trial court was filed in the court of appeals. However, Keenan's petition was filed almost two (2) years after the expiration of the 180 day period allowed by the newly enacted section of Ohio Revised Code, § 2953 21.

In *Keenan*, the state trial court had ruled on the merits of his post-conviction petition and dismissed his petition on its merits. However, on appeal, the state court of appeals, *sua sponte*, raised the issue of whether the petition was filed outside the newly enacted statute of limitations. It then denied the appeal on that basis. A further attempted appeal to the Ohio Supreme Court was unsuccessful when that court denied leave to file a discretionary appeal.

In any event, *Keenan* filed his habeas corpus petition within the one-year period after the Ohio Supreme Court had declined to hear his appeal Notwithstanding the Ohio Supreme Court order allowing Keenan to file his petition, the

District Court dismissed the habeas corpus petition as being time-barred. The Sixth Circuit reversed, ruling that equitable tolling was to be considered. The Sixth Circuit ruled that the district court had to consider whether there was 1) a lack of actual knowledge of the filing requirement, 2) a lack of constructive knowledge of the filing requirement, 3) a lack of diligence in pursuing one's rights, or 4) an absence of prejudice to the defendant and petitioner's reasonableness in remaining ignorant of the notice requirements. Therefore, the dismissal was reversed and remanded for an evidentiary hearing applying these factors. (Judge Merritt, in his concurring opinion, would have ruled on appeal that the habeas petition was timely filed.)

A similar situation exists in this case. The District Court, knowingly or unknowingly, granted Petitioner seventeen days (17) days to February 27, 2004, to file his notice of appeal. Petitioner's notice of appeal was filed on February 26, 2004. On appeal, Respondent only obliquely referenced a timeliness issue in a terse statement: "This Court lacks jurisdiction to hear this appeal pursuant to Title 28 U.S.C. 1291, 1294. (Respondent-Appellee's Final Brief at p. 1) (emphasis added). The Sixth Circuit, on its own, then proceeded to dismiss the appeal as being untimely.

The Sixth Circuit did note that it had jurisdiction to consider the February 10, 2004 order of the District Court. However the Sixth Circuit proceeded to ignore this issue in its quizzical statement of "why would, or could, the petitioner appeal the February order when its outcome was favorable to him? We leave this question unanswered." 432 F.3d at 677 (Jt. App. 192).

C. As The Sixth Circuit Retained Jurisdiction Over The District Court's Order Dated February 10, 2004, Any Defect Below Could Have Been Cured.

Overlooked in the convoluted proceedings in the Sixth Circuit was a previous order by the Sixth Circuit that it had jurisdiction over the District Court's February 10, 2004 order allowing Petitioner to reopen his appeal. Consequently, that order was properly before the Sixth Circuit. When the Sixth Circuit ultimately determined that the District Court had erroneously granted an improper extension of time, the proper remedy would be to vacate the order of February 10, 2004 and remand the case to the District Court with instructions to enter a proper order granting Petitioner a fourteen (14) day period of time to file his notice of appeal.

However, that resolution was not considered by the Sixth Circuit even though Petitioner, in his petition for a rehearing, suggested that the Sixth Circuit could consider that alternative. The Sixth Circuit had jurisdiction over the February 10, 2004 order by the District Court. Apparently that remedy was lost in the procedural morass involved in this case. The Sixth Circuit in this case failed to apply any decisions from this Court where litigants have reasonably relied on court orders. The Sixth Circuit, instead, opted for an inflexible bright line mechanical time computation and dismissed the appeal.

The Sixth Circuit did have jurisdiction to review the February 10, 2004 order and relief was available. As noted, a cumbersome, although time-consuming resolution, would have been to vacate the District Court's order reopening the appeal and remand the matter to the District Court to enter a proper order reopening the appeal for a period of fourteen (14) days. This resolution was suggested in the petition for rehearing filed in the Sixth Circuit Thus, this remedy is properly before this Court.

In any event, any perceived deficiency would be "curable." A similar situation was encountered by the litigant in *Becker v. Montgomery*, 532 U.S. 757 (2000). In *Becker* a *pro se* litigant filed a notice of appeal but failed to sign it. The Court of Appeals dismissed the appeal, ruling the defect to be "jurisdictional" and not subject to being cured outside the allowable time for filing a notice of appeal. This Court reversed, noting that "no court . . . officer called [petitioner's] attention to the need for a signature, and the dismissal order, long after the 30-day time to appeal expired, accorded [petitioner] no opportunity to cure the defect." 532 U.S. at 761. (emphasis added).

The court referenced Appellate Rule 1 (a)(2)'s direction to comply with the practice of the district court and applied the Civil Rule 11(a) which allowed an omission of a signature to be supplied after it has been called to the party's attention. Notably Civil Rule 11(a)'s curative feature is not limited to *pro se* litigants but applies to all whether represented or not.

The Sixth Circuit in considering this issue, concluded, notwithstanding a prior order by another Sixth Circuit panel, that "this court has never held that jurisdiction is proper in this case. Rather, when the issue of jurisdiction is properly before us we have consistently found it to be lacking." 432 F.3d at 676. (Jt. App. 190).

Despite Judge Boggs's exegesis on the law of the case doctrine, the February 10, 2004 order was before the Sixth Circuit for consideration. Thus, as previously noted, the matter could have been easily resolved by vacating the February 10, 2004 order of the District Court and remanding the case to the District Court to re-enter an order granting Petitioner fourteen (14) days to file a notice of appeal. This would have obviated the extended discussion concerning jurisdiction and "claim-processing" rules. This remedy would have permitted this case to be decided on its merits.

D. The District Court Had Authority To Extend The Time To Appeal Beyond The Fourteen (14) Day Period.

Rule 1(a)(2) of the Federal Rules of Appellate Procedure states:

> When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

This would necessarily implicate Rule 6(b) of the Federal Rules of Civil Procedure which limits enlargement of time motions only "for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them." Absent in the rule is any explicit statement prohibiting an enlargement of time to file an appeal after granting a Rule 4(a)(6) motion. Therefore, the additional 3-day grant by the District Court was proper.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and remand this cause to that Court to rule on the merits of Petitioner's appeal.

Respectfully submitted,

PAUL MANCINO, JR. *
PAUL MANCINO, III
BRETT MANCINO
75 Public Square, Suite 1016
Cleveland, Ohio 44113-2098
(216) 621-1742

* Counsel of Record

Counsel for Petitioner

APPENDIX

APPENDIX A

Rule 1. Scope of Rules; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [Abrogated]

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979, Apr. 25, 1989, eff. Dec 1, 1989, Apr. 29, 1994, eff. Dec 1, 1994, Apr 24, 1998, eff. Dec 1, 1998, Apr. 29, 2002, eff. Dec 1, 2002)

ADVISORY COMMITTEE NOTES

1967 Adoption

These rules ate drawn under the authority of 28 U.S.C. § 2072 as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S.Code Cong. & Ad.News, p. 1546 (1966)) (Rules of Civil Procedure); 28 U.S.C. § 2075 (Bankruptcy Rules); and 18 U.S.C. §§ 3771 [§ 3771 of Title 18, Crimes and Criminal Procedure] (Procedure to and including verdict) and 3772 [§ 3772 of Title 18] (Procedure after verdict). Those statutes combine to give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals By the terms of the statutes after the rules have taken effect all laws in conflict with them are of no further force of effect. Practice and procedure in the eleven courts of appeals are now regulated by rules promulgated by each court under the authority of 28 U.S.C. § 2071. Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules.

As indicated by the titles under which they are found, the following rules are of special application: Rules 3 through 12 apply to appeals from judgments and orders of the district courts; Rules 13 and 14 apply to appeals from decisions of the Tax Court (Rule 13 establishes an appeal as the mode of review of decisions of the Tax Court in place of the present petition for review); Rules 15 through 20 apply to proceedings for review or enforcement of orders of administrative agencies, boards commissions and officers. Rules 22 through 24 regulate habeas corpus proceedings and appeals in forma pauperis. All other rules apply to all proceedings in the courts of appeals.

1979 Amendment

The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process, whether they take place in the district court or in the court of appeals, and with their adoption Rules 72 to 76 of the F.R.C.P. [rules 72 to 76, Federal Rules of Civil Procedure] were abrogated. In some instances, however, the F.R.A.P. provide that a motion or application for relief may, or must, be made in the district court. See Rules 4(a), 10(b) and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the F.R.C.P. or F.R.Cr.P. [Federal Rules Criminal Procedure] and local rules relating to the form and presentation of motions and is not governed by Rule 27 of the F.R.A.P. See Rule 7(b) of the F.R.C.P. [rule 7(b), Federal Rules of Civil Procedure] and Rule 47 of the F.R.Cr.P. [rule 47, Federal Rules of Criminal Procedure].

1989 Amendment

The amendment is technical No substantive change is intended.

1994 Amendment

Subdivision (c). A new subdivision is added to the rule. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the title provision among other rules. In a similar fashion the Bankruptcy Rules combine the provisions governing the scope of the rules and the title in the first rule.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (a) that describes the different types of proceedings that may be brought in a court of appeals. The Advisory Committee believes that the language is unnecessary and that its omission does not work any substantive change.

2002 Amendments

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291 *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes,

and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided fox by the latter, FRAP will "extend or hurt the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete For that reason, subdivision (b) has been abrogated, subdivision (b) has been abrogated.

APPENDIX B

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil ease for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 If the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties. In accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires as a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed, or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or

order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal at Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion, or

(ii) the entry of the judgment of conviction

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a

period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate filed the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to filed a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry

of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing m the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979, Nov. 18, 1988, Pub. L. 100-690, Title VII, § 7111, 102 Stat. 4419, Apr. 30, 1991, eff. Dec. 1, 1991, Apr. 22, 1993, eff. Dec. 1, 1993, Apr. 27, 1995, eff. Dec. 1, 1995, Apr. 24, 1998, eff. Dec. 1, 1998, Apr. 29, 2002, eff. Dec. 1, 2002, Apr. 25, 2005, eff. Dec. 1, 2005.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a) This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title] without any change of substance. The requirement that a request for an extension of tune for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b) [rules 73(a) and 6(b), Federal Rules of Civil Procedure] *North Umberland Mining Co v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952), *Cohen v. Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962), *Plant Economy Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of § 25 of the Bankruptcy Act (11 U.S.C.§ 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one,

since a successful litigant in a bankruptcy proceeding may, under § 25, oblige an aggrieved party to appeal within 30 days after entry of judgment—the time fixed by this subdivision in cases involving private parties only—by serving him with notice of entry on the day thereof, and by the terms of § 25 and aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appeals why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, § 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cause referred to in § 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein v Reikes*, 54 F.2d 481 (2d Cir., 1931), *cert den.*, 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶ 24.12 through ¶ 24.36 (1962). As a result it is not always clear whether an appeal is governed by § 25 or by FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title], which is applicable to such appeals in bankruptcy as are not governed by § 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

APPENDIX C

Rule 26. Computing and Extending Time

(a) Computing Time The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file.

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

(As amended Mar. 1, 1971, eff. July 1, 1971, Mar. 10, 1986, eff. July 1, 1986, Apr. 25, 1989, eff. Dec. 1, 1989, Apr. 30, 1991, eff. Dec. 1, 1991, Apr. 23, 1996, eff. Dec. 1, 1996, Apr. 24, 1998, eff. Dec. 1, 1998, Apr. 29, 2002, eff. Dec. 1, 2002, Apr. 25, 2005 eff. Dec. 1, 2005)

APPENDIX D

Rule 6. Time

(a) Computation. In computing any period of tune prescribed or allowed by these rules, by the local rules of any district court by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b),

(d) and (e), and 60(b), except to the extent and under the conditions stated in them.

[(c) Rescinded Feb. 28, 1966, eff. July 1, 1966]

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C) or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar 1, 1971, eff. July 1, 1971; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 29, 1999, eff. Dec. 1, 1999; Apr. 23, 2001, eff. Dec. 1, 2001, Apr. 25, 2005, eff. Dec. 1, 2005)